

This Opinion is Not a
Precedent of the TTAB

Mailed: January 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gillard

Serial No. 87469115

John E. Gillard, pro se.

Mark S. Tratos, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

Before Taylor, Kuczma, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

A few minutes after midnight Eastern Time on May 31, 2017, President Trump
tweeted the following:



The tweet went viral before it was deleted a few hours later, and it sparked extensive and wide-ranging discussion of the enigmatic final word “covfefe.” It also apparently came to the attention of John E. Gillard (“Applicant”), who applied later that day to register #COVFEFE in standard characters on the Principal Register for “hats; T-shirts; wristbands as clothing; hoodies; jackets; jerseys; ties as clothing; tops as clothing,” in International Class 25.¹

The Trademark Examining Attorney has refused registration of Applicant’s proposed mark under Sections 1, 2, 3, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-1053, and 1127, on the ground that #COVFEFE does not function as a trademark for the goods identified in the application. When the refusal was made final, Applicant appealed and requested reconsideration, 4 TTABVUE, which was denied. 5-6 TTABVUE. The appeal is fully briefed. We affirm the refusal to register.

I. Record on Appeal and Evidentiary Issue

A. Record on Appeal

Applicant amended his intent-to-use application to allege use of his proposed mark under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and submitted several

¹ Application Serial No. 87469115 did not contain a filing basis, but Applicant subsequently amended his application to seek registration under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on his allegation of a bona fide intention to use the mark in commerce. Applicant depicts the word “covfefe” in the applied-for mark in all lowercase letters as permitted under Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) Section 807.03(a) (Oct. 2018). Because Applicant makes a standard character claim, we will depict the word in this decision in all uppercase letters. *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059 n.1 (TTAB 2013).

specimens of use.² The remainder of the record consists of the following evidence made of record by the Examining Attorney:³

1. Articles in online publications, or on websites for the electronic media, regarding the President's tweet and the word "covfefe;"⁴
2. Webpages reflecting the use of the word "covfefe" in social media;⁵
3. Websites displaying the word "covfefe;"⁶
4. Images resulting from searches of the words "covfefe meme" and "covfefe mugs" using the Google search engine;⁷

² August 15, 2017 Amendment to Allege Use at 1-10. All citations to the record in this opinion are to pages in the Trademark Status & Document Retrieval ("TSDR") database.

³ We commend the Examining Attorney for the thorough and well-organized record, which facilitated our review and disposition of the appeal.

⁴ August 11, 2017 Office Action at 2 (nytimes.com), 5 (dailymail.co.uk), 7-21 (wired.com), 24 (npr.org), 30 (bbc.com), 31-32 (vox.com), 33-34 (news.com.au), 41-45 (dailydot.com), 54 (businessinsider.com); September 11, 2017 Final Office Action at 2-14 (washingtonpost.com), 16-19 (latimes.com), 20 (politifact.com), 26 (nerdist.com), 29 (617vip.com), 30-32 (telegraph.co.uk), 53 (newsobserver.com), 61(magazine.promomarketing.com), 70 (blackphoenixalchemylab.com), 72 (wnbf.com), 73 (nbcwashington.com); March 20, 2018 Denial of Request for Reconsideration at 2 (washingtonpost.com), 3, 11 (teenvogue.com), 4-10 (bustle.com). The websites at dailymail.co.uk, bbc.com, and telegraph.co.uk pertain to publications or electronic media originating in the United Kingdom, while the website at news.com.au pertains to an Australian publication. "Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007). The bbc.com website appears to be directed to readers in the United States and Canada, but the extent of the exposure of the other three websites in the United States is unclear. Accordingly, we have not relied on those three websites in our decision.

⁵ *Id.* at 22 (YouTube), 25-29, 35-39 (Twitter), 29 (Instagram), 63 (Facebook); September 11, 2017 Final Office Action at 21-25, 74-76 (Twitter), 27-28, 40-43 (Reddit).

⁶ August 11, 2017 Office Action at 23 (McSweeney's Internet Tendency), 40 (knowyourmeme.com); September 11, 2017 Final Office Action at 33 (cran.r-project.org), 52 (kickstarter.com), 55 (cultofmac.com).

⁷ *Id.* at 46-53, 60.

5. Webpages displaying products and services bearing, or identified by, the word “covfefe;”⁸
6. A purported definition of the word “covfefe” from the URBAN DICTIONARY;⁹ and a *New York Times* article regarding the URBAN DICTIONARY;¹⁰
7. A page from the Macmillan Dictionary Blog (macmillandictionaryblog.com) regarding the word “covfefe;”¹¹
8. A Wikipedia entry entitled “Donald Trump on social media;”¹²
9. A page from Apple Music Preview (itunes.apple.com) listing three songs available through Itunes with the word “covfefe” in their titles;¹³ and
10. The results of a search of the LexisNexis database regarding stories about “covfefe” shirts.¹⁴

B. Evidentiary Objection

Before proceeding to the merits of the refusal, we address an evidentiary matter.

In his main brief, Applicant refers to Registration No. 4860384 for the mark DOGE

⁸ August 11, 2017 Office Action at 55 (lookhuman.com), 56 (teeducky.com), 57-58 (teepublic.com), 59, 72-73 (amazon.com), 61-62 (etsy.com), 64-67 (untappd.com), 68 (drinkings.coffee), 69 (me.me), 70 (shopvesseldrinkware.com), 71, 74 (cafepress.com); September 11, 2017 Final Office Action at 34 (covfefeprints.com), 35-38 (redbubble.com), 39 (imgur.com), 45, 77-85 (amazon.com), 46 (teespring.com), 47 (teeshirtpalace.com), 48 (spreadshirt.com), 49 (newseum.org), 50 (inktale.com), 51 (teezily.com), 54 (mashable.com), 56-58, 71, 87 (cafepress.com), 59-60 (myfrogtee.com and ifrogtee.com), 62, 68-69, 86 (etsy.com).

⁹ August 11, 2017 Office Action at 3; September 11, 2017 Final Office Action at 63.

¹⁰ *Id.* at 64-67.

¹¹ August 11, 2017 Office Action at 6.

¹² September 11, 2017 Office Action at 15.

¹³ *Id.* at 44.

¹⁴ March 20, 2018 Denial of Request for Reconsideration at 12-33.

and Registration No. 5020556 for the mark MAKE AMERICA GREAT AGAIN. 8 TTABVUE 3. The Examining Attorney responds that although he “has addressed the Applicant’s arguments in relation to [these registrations] . . . the Applicant did not made [sic] these registrations of record,” 11 TTABVUE 17,¹⁵ and the Examining Attorney “requests that such evidence not be considered by the Board.” *Id.* In his reply brief, Applicant “reject[s] this thought as these clearly have an impact on the context of this refusal.” 12 TTABVUE 2. He claims that the registration of MAKE AMERICA GREAT AGAIN “is clear evidence that my mark is registrable” and that the registration of DOGE “directly contradicts the examiner’s assertion that a well know[n] saying, regardless of origin, cannot be registered,” *id.* at 3, but he does not address his failure to make the registrations of record during prosecution.

Rule 2.142(d) of the Trademark Rules of Practice, 37 C.F.R. § 2.142(d), provides in pertinent part that the “record in an application should be complete prior to the filing of an appeal.” Because neither of the referenced registrations was made of record during prosecution, we sustain the Examining Attorney’s objection and have given no consideration to those two registrations. *Cf. In re Fiat Grp. Mktg. Marketing & Corp. Commc’ns. S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).¹⁶ Applicant’s

¹⁵ The Examining Attorney advised Applicant during prosecution that the registrations were not of record. September 11, 2017 Final Office at 1 (Registration No. 4860384); March 20, 2018 Denial of Request for Reconsideration at 1 (Registration No. 5020556).

¹⁶ In his reply brief, Applicant states that “if the board agrees the two registered marks be not used as reference due to them [sic] not being part of record in a timely manner, I request that the board refuse[] to accept the reply brief of examiner filed after the mandatory 60 day window.” 12 TTABVUE 2. We reject that request. Following the filing of Applicant’s brief, the Board issued a paper on May 22, 2018 purporting to forward the electronic record of the application file to the Examining Attorney for preparation of his brief, 9 TTABVUE, but the Board subsequently recognized that it had not forwarded the file, and it issued a second paper

arguments are unavailing in any event because the two registrations involve different marks, and the eligibility of each applied-for mark for registration must be evaluated on its own merits. *See, e.g., In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“[t]he PTO is required to examine all trademark applications for compliance with each and every eligibility requirement”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (the PTO’s actions in issuing prior registrations does not bind examining attorneys, the Board, or the court).

II. Analysis of Failure to Function Refusal

A. Summary of Applicable Law

“The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify.” *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976). Section 45 of the Act defines a “trademark” as “any word, symbol, or device, or combination thereof—(1) used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127. “It is well settled that not every designation that is placed or used on a product necessarily functions as a trademark for said product and not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose.” *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710,

on June 29, 2018 forwarding the file and allowing the Examining Attorney 60 days from that date to file his brief. 10 TTABVUE. The Examining Attorney’s brief was timely filed on August 24, 2018. 11 TTABVUE.

1713 (TTAB 2016) (citing *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)). “The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public.” *Id.*

There are multiple reasons why a word or symbol may fail to function as a trademark. *See generally* TMEP Section 1202 (listing 15 grounds for refusal of registration under the general failure-to-function rubric).¹⁷ Here, the Examining Attorney invokes the “informational matter” type referenced in TMEP Section 1202 in refusing registration of #COVF EFE because it is “a social, political, or similarly informational message that is understood to be and commonly used as a reference to President Trump, typically expressing either support or disapproval of the President.” 11 TTABVUE 5.

Words or phrases may fail to function as trademarks because of their nature, including because they are “common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry,” or because they are “slogans or other terms that are considered to be merely informational in nature.” *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (affirming refusal to register No More RINOs! (short for “No More Republicans in Name Only”) for clothing and other goods). *See also Eagle Crest*, 96 USPQ2d at 1232 (affirming refusal to register ONCE A MARINE, ALWAYS A MARINE for clothing because it would be perceived as an

¹⁷ One such ground is that a mark is merely a hashtag. “A mark consisting of or containing the hash symbol (#) . . . is registrable as a trademark . . . only if it functions as an identifier of the source of the applicant’s goods . . .” TMEP Section 1202.18. Neither Applicant nor the Examining Attorney focuses on the fact that the applied-for #COVF EFE mark is a hashtag, but we will consider that fact to the extent that it is relevant to the public perception of the applied-for mark.

informational slogan “to express support, admiration or affiliation with the Marines”); *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998) (affirming refusal to register DRIVE SAFELY for automobiles because it would be perceived as an everyday, commonplace safety admonition); *D.C. One Wholesaler*, 120 USPQ2d at 1716 (sustaining opposition to registration of I ♥ DC for clothing because it would be perceived as “an expression of enthusiasm, affection or affiliation with respect to the city of Washington, D.C.”).

B. Summary of Arguments

1. Examining Attorney

The Examining Attorney argues that “[w]hile the word ‘COVF EFE’ had no known meaning when it was used by President Trump, the wording was extensively reported on and referenced throughout the internet and social media” and that “[a]s the wording ‘COVF EFE’ received increased media and internet coverage, the applied-for mark ‘#COVF EFE’ and the wording ‘COVF EFE’ were subsequently used by a variety of dictionaries, media outlets, third party websites, and social media users as a reference to President Trump, often either in support or disapproval of the President.” 11 TTABVUE 6. The Examining Attorney further argues that the “widespread use of and reporting on the applied-for mark ‘#COVF EFE’ and of the term ‘COVF EFE’ shows that the general public understands the applied-for mark is a direct reference to President Trump, the originator of the term,” *id.* at 7, and that “not only is the applied-for mark understood to be a reference to President Trump, but it is also

frequently and commonly used as a social, political, or similarly informational message in support or disapproval of President Trump.” *Id.* at 7-8.

The Examining Attorney further claims that “[c]onsumers are accustomed to seeing both ‘#COVF EFE’ and ‘COVF EFE’ used by many different sources on a variety of goods and services as an approving or disapproving social, political or similarly informational message about President Trump.” *Id.* at 8. He points to evidence of use of COVF EFE in various forms on merchandise, *id.* at 8-11, including some of the goods identified in the involved application, *id.* at 11-12, and argues that most of those uses are ornamental in nature. *Id.* at 13. He concludes that the message of support or disapproval for President Trump conveyed by the word COVF EFE will cause consumers viewing #COVF EFE to understand it to convey “a social, political, or similarly informational message and not as an indicator of source.” *Id.*

2. Applicant

Applicant, appearing pro se, argues in his main brief that the applied-for mark is a “brand of goods having not to do with ‘informational messaging’.” 8 TTABVUE 2. He claims that the cases cited by the Examining Attorney and summarized above “are irrelevant and outside the scope” of his application. *Id.* He distinguishes *Hulting* on the ground that the slogan No More RINOS! comprises “generic commonplace words presented as ornamental,” while #COVF EFE is “unique and fanciful wording and should have very strong protection under the [Trademark] Act,” *id.*, because it is “neither a call to action nor ornamental, but rather functions as a mark for brand of goods.” *Id.* at 3. He distinguishes *Eagle Crest* on the ground that unlike the phrase

ONCE A MARINE, ALWAYS A MARINE, which he claims “deals with a well know[n] American institution, along with a slogan of common words,” #COVFefe “is neither a common or real word slogan or refers to any American institution, and further falls under unique and fanciful protection.” *Id.* He distinguishes *Volvo* on the ground that unlike the phrase DRIVE SAFELY, which “refers to a common use of the English language with generic meaning,” #COVFefe “is unique and fanciful.” *Id.*

Applicant also argues in his main brief that COVFefe “means nothing, supports nothing, is indecipherable to any word in the English language, and only defined as slang in ‘urban dictionary,’” and that the applied-for mark “will not be confused as origination from Trump or the like, since the tweet from Trump still to this day has no definition, meaning, source of goods, or really anything to do with anything within the scope of my application for mark.” *Id.*

In his reply brief, Applicant argues that “[t]here is no true meaning of the word covfefe” and “therefore my registration as chronologically first of its kind holds very much weight as has been said by examiner and case law that each mark must be based on its own merits.” 12 TTABVUE 3. He concludes by stating that the “extensive 3rd party use of my mark in an ornamental manner will be something that I as the brand and mark owner will have to deal with on my own accord,” but argues that he does “not believe the fact that there are goods in commerce using my brand in ornamental ways should preclude me from having my protection of my mark under the rights afforded to me by the Act.” *Id.*

C. Merits of Refusal

As noted above, the “critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public.” *D.C. One Wholesaler*, 120 USPQ2d at 1713. “To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.” *Hulting*, 107 USPQ2d at 1177 (quoting *Eagle Crest*, 96 USPQ2d at 1229). We turn first to the record evidence regarding the history and use of the word “covfefe.”

1. Use of COVFEFE and #COVFEFE by the Public

Public discussion of the President’s mysterious “covfefe” tweet began almost immediately, and it was encouraged by the President himself in a subsequent tweet at 6:09 a.m. Eastern Time on May 31, 2017, a few minutes after the original tweet was deleted:



Articles regarding the original tweet, and the public’s reaction to the word “covfefe,” appeared on May 31, 2017 in THE NEW YORK TIMES, THE WASHINGTON POST, THE LOS ANGELES TIMES, the BBC NEWS (US & Canada edition), and numerous other

¹⁸ September 11, 2017 Final Office Action at 3.

publications.¹⁹ These articles, and numerous May 31, 2017 tweets in the record, collectively indicate that some members of the public immediately used “covfefe” to allude to the President, some used it in more general popular culture references, and some used it as a vehicle for self-styled humor, or volunteered possible “meanings” of the word.

According to the May 31, 2017 WASHINGTON POST article, before the President’s tweet was deleted, it had been retweeted more than 127,000 times and “liked” more than 162,000 times, and “the word ‘covfefe’ had been trending all night.”²⁰ The article noted that the word does not appear in the MERRIAM-WEBSTER DICTIONARY, discussed possible meanings of the word, and displayed numerous tweets in which members of the public weighed in on that subject. The article illustrated that Twitter users variously used the word as a synonym for “coffee,” suggested that “it might make a great band, or perhaps human, name,” used it in references to popular television programs and iconic films, “reimagined famous brand slogans, replacing brand names with it,” and “raced to tweet the best ‘covfefe’ joke.” The article also mentioned “a poll asking others to weigh in on the strange word’s pronunciation.”

¹⁹ These articles, and the record as a whole, reflect the incredible speed and reach of the Internet as a communication medium, and the remarkable extent to which people use it to communicate in real time, at all hours of the day and night.

²⁰ September 11, 2017 Final Office Action at 3-14. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed form or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We take judicial notice that in the context of this article, the word “trending” means “widely mentioned or discussed on the Internet, especially on social media websites.” DICTIONARY.COM (dictionary.com, Unabridged Random House, Inc., last accessed on December 21, 2018).

A May 31, 2017 article on the website at wired.com entitled *The Internet Defines Covfefe* displayed multiple tweets “defining” the word,²¹ including the following:



²¹ August 11, 2017 Office Action at 8-18.

²² *Id.* at 15.

²³ *Id.* at 16.



The BBC NEWS (US & Canada edition) edition of May 31, 2017 contained an article entitled ‘*Covfefe*’: *Trump invents new word and melts internet*.²⁵ It reported that when then-White House Press Secretary Sean Spicer was asked about the word at a May 31 press briefing, he stated that the “President and a small group of people know exactly what he meant.” The article also reported that “[n]o time was wasted as some users put the word on a T-shirt, which they started to see on eBay,” and that someone had purchased the domain name *covfefe.us*. The article displayed tweets reflecting how various members of the public had used the word:

²⁴ August 11, 2017 Office Action at 18.

²⁵ *Id.* at 30.

 Jimmy Kimmel 
@jimmykimmel 

what makes me saddest is that I know I'll never write anything funnier than #covfefe

RETWEETS 1,827 LIKES 6,747 

TWITTER / JIMMY KIMMEL

US comedian Jimmy Kimmel was among the celebrities to join in

 Jackson Dame 
@jacksondame 

okay this is the best I've got #covfefe



TWITTER / JACKSON DAME

Some people made parodies related to films, such as this take on Arrival

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 Steve Galgas 
@gt3k 

"Pat, I'd like to solve the puzzle..." #TRUMP



WHEEL OF FORTUNE HISTORICAL TWEETS
<http://aton.smasher.org/wof/>

TWITTER / STEVE GALGAS

And US game show Wheel of Fortune

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²⁶ August 11, 2017 Office Action at 30.

²⁷ *Id.* at 30.

A May 31, 2017 article on Vox.com entitled *Donald Trump's cryptic covfefe tweet brought out the best in Twitter* discussed a new “world of covfefe” and a frenzied “wave of Twitter replies,” and displayed a number of those “replies,” including:



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²⁸ August 11, 2017 Office Action at 32.

²⁹ *Id.*

A May 31, 2017 NERDIST article summarized the immediate whirlwind of public discussion of “covfefe” as follows:

A ROUNDUP OF THE BEST COVFEFE MEMES AND JOKES ON TWITTER

 POSTED BY MICHAEL ARBEITER ON MAY 31, 2017

SHARE:     

 WEB

Future generations will ask, “What does *covfefe* mean?”

On the one hand: Nothing. Absolutely nothing. Decidedly, indelibly, despondently, and abjectly nothing. Wholly nothing. Whatsoever nothing. Nothing at its very fibers and fabrics. Nothing on a cosmic level. That it’s so enchantingly estranged from the ground-level necessities of a comprehensible, substantial, or meaningful thought is the mighty beauty of it.

But even more beautiful is the fact that, despite all this, on the other hand, it does mean something. Something very special to all of us. Because we didn’t let this nonsense word-tweeted in what we, offering a most generous benefit of the doubt, might assume to be great haste by **President Donald Trump** late Tuesday night—merely crumble beneath the weight of its vexing incoherence. No—we crushed, pummeled, and eviscerated the everliving hell out of it. Together.

It didn’t take long for the internet to seize the opportunity either. Almost immediately following the publication of the tweet, which hit the ‘net right around midnight ET...

...the valiant knights of Twitter leapt to the task with jokes and memes tearing mercilessly into the remarkable inscrutability of this most recent effort in communication by the United States’ Commander-in-Chief. Scoff though we may, there is something to be said for the bliss, fortitude, and—most importantly—unity with which they embraced the task of lampoonery. No, those who leapt at the opportunity may not have ushered in a shift in tides; sure, you can say that such time and energy would be better served focused on the severe ramifications of Trump’s influence and rein. Yes, there’s plenty more we could all be doing to ensure a better world for ourselves and our fellow Americans, longstanding and newcomers alike, in this especially trying day and age.

But sometimes, we need something like *covfefe* to remind us that we’re all in this together.

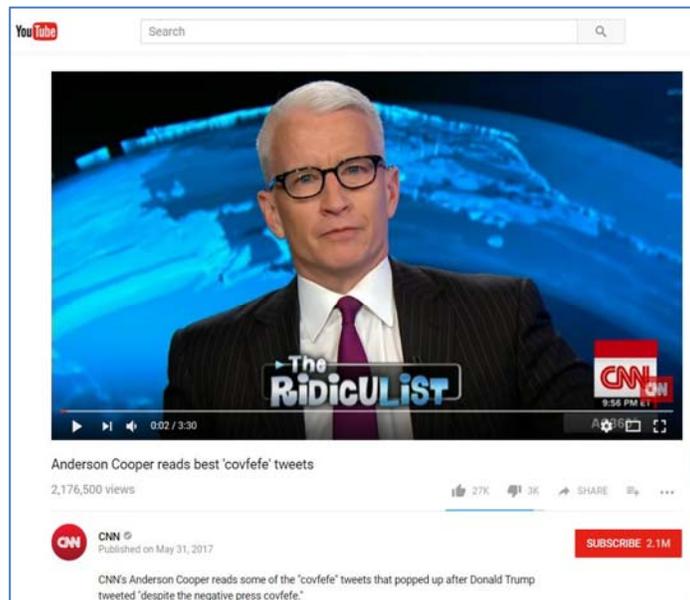
As such, when future generations do ask us what that infernal non-word really means, may we share **this bounty of memes and jokes** spawned in the wake of its abominable conception.

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³⁰ September 11, 2017 Final Office Action at 26 (nerdist.com). A Wikipedia entry regarding the President and social media devoted a section to his “covfefe” tweet. *Id.* at 15.

The article displayed tweets making reference to the television shows *Twin Peaks*, *American Horror Story*, and *Game of Thrones*, and the films 2001: A SPACE ODYSSEY and ARRIVAL.

On May 31, 2017, CNN's Anderson Cooper discussed the President's tweet in his "The Ridiculist" segment:



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The record also contains articles, memes,³² and tweets regarding the word "covfefe" from the period after May 31, 2017.³³ A June 12, 2017 article on the website at Business Insider began with the words "Covfefe' will never die," and reported that Representative Mike Quigley of Illinois had introduced legislation in the House of

³¹ September 11, 2017 Final Office Action at 22.

³² In the context of the record, the word "meme" means "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on December 21, 2018).

³³ August 11, 2017 Office Action at 36-40, 54; September 11, 2017 Final Office Action at 21-25; March 20, 2018 Denial of Request for Reconsideration at 14-19, 23-33.

Representatives entitled the “Communications Over Various Feeds Electronically for Engagement” (COVFefe) Act to amend the Presidential Records Act to require the storage of all presidential tweets and social media interactions by the National Archives.³⁴ An article on the website Know Your Meme in the summer of 2017 described the history of the public reaction to the President’s tweet, reported that #covfefe became the #1 trending hashtag in the world following the tweet, discussed the Quigley bill, and described and displayed various tweets, memes, and other uses of the word on social media.³⁵

The Examining Attorney also made of record the results of an August 10, 2017 search of the Google search engine using the search term “covfefe meme,”³⁶ which display a wide array of memes. We depict a sampling below:



³⁴ August 11, 2017 Office Action at 54 (businessinsider.com).

³⁵ *Id.* at 40 (knowyourmeme.com).

³⁶ *Id.* at 46-53.

³⁷ *Id.* at 50.



2. Use of COVFEFE and #COVFEFE on Merchandise

In addition to uses of COVFEFE and #COVFEFE in social media and public discourse, the record shows almost immediate post-May 31, 2017 use of the word on merchandise. On June 1, 2017, an article entitled *Yep, Trump ‘Covfefe’ Merch is All the Rage Online Right Now* appeared on the website of PROMO MARKETING magazine.³⁹ It reported that “[b]ecause there was no explanation offered on what ‘covfefe’ actually meant, or whether it was truly a typo, the internet decided to have its own fun with the new word,” and that “[a]s a result, internet memes everywhere erupted, and the final step of the internet’s joyride is, of course, merchandise.” The article displayed “a roundup of the most popular products,” including a hat, T-shirts, a bodysuit, and mugs.

³⁸ August 11, 2017 Office Action at 51.

³⁹ September 11, 2017 Final Office Action at 61 (promomarketing.com).

An article in the June 1, 2017 edition of THE WASHINGTON POST entitled *Would you buy a \$21.99 ‘covfefe’ T-shirt?* stated that a “number of online retail sites are trying to cash in on the willingness of consumers to wear clothing with President Trump’s most recent Twitter typo,” and discussed merchandise that was available on several websites.⁴⁰ Articles that day in TEEN VOGUE (entitled *Donald Trump’s Covfefe Twitter Mistake Has Already Inspired Merch*),⁴¹ and BUSTLE (entitled *7 Covfefe Shirts That Are Seriously Already Available to Buy*),⁴² similarly discussed the public dialogue regarding the meaning of “covfefe” and the immediate availability of merchandise bearing the word.

The record contains numerous examples of clothing bearing the word COVFEFE or the hashtag #COVFEFE, including several of the clothing items identified in the involved application.⁴³ We reproduce a small representative sample below:

⁴⁰ March 20, 2018 Denial of Request for Reconsideration at 2.

⁴¹ *Id.* at 3.

⁴² *Id.* at 4-10.

⁴³ August 11, 2017 Office Action at 55, 56, 57-58, 59, 72-73, 61-62, 64-67, 68-71, 74; September 11, 2017 Final Office Action at 34-39, 45-51, 54, 56-60, 62, 68-69, 71, 77-85-87; March 20, 2018 Denial of Request for Reconsideration at 2-11.



Men's Heathered Tee / Heathered Black
(341763-6010-heathered_black-md)

COVFefe DEFINITION T-SHIRT \$19.99 ~~\$28.00~~

Show off your knowledge of current events and Twitter with this nonsense tweet, President of the United States, "covfefe" definition, Donald Trump humor shirt! Maybe it's just a typo? Or maybe it is a perfect metaphor for the entire Trump administration! Nonsense!

Baby One-Piece

Hoodie

Racerback Tank

Tank

Tee

V-neck Tee

Our men's heathered crewneck tee features a slim fit and is made from a blend of 25% cotton, 25% rayon, and 50% polyester. Printed in the USA.

SELECT STYLE

- Women's Cotton Tee
- Men's Cotton Tee
- Men's Heathered Tee
- Women's Heathered Tee

SELECT SIZE [Size Guide](#)

Medium ▾

TOPICS 44



\$19.66



\$19.58



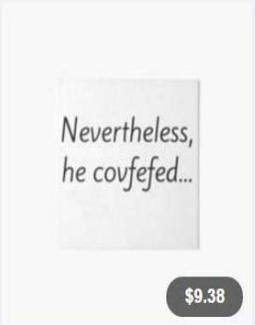
\$19.58



\$27.58



\$29.50



\$9.38



\$2.50



\$21.13

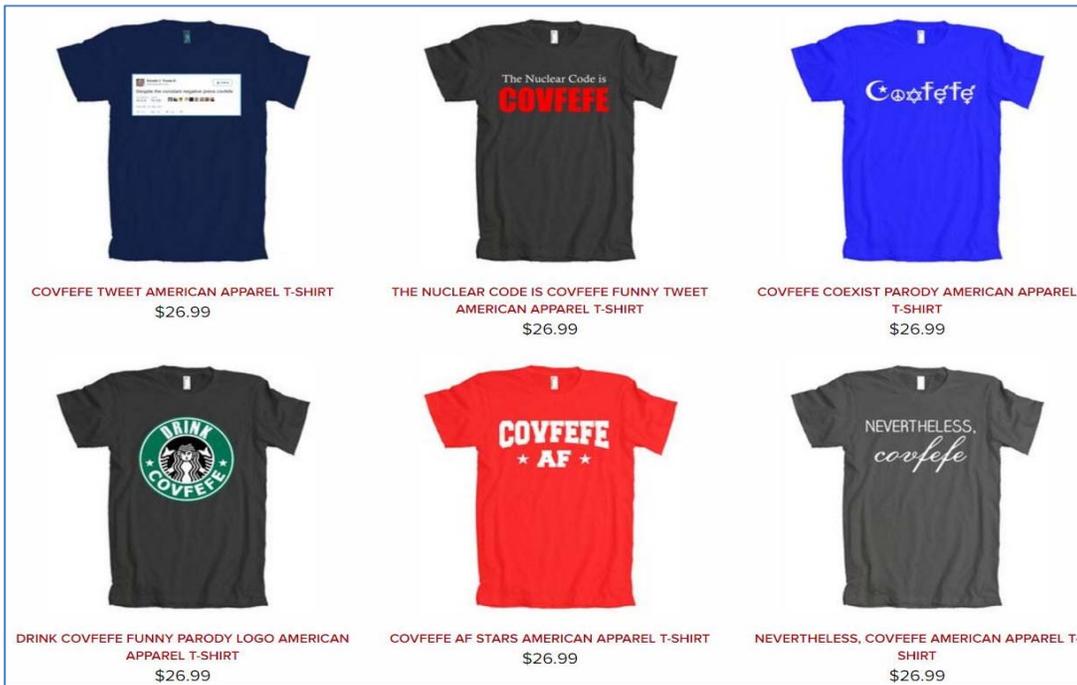
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⁴⁴ August 11, 2017 Office Action at 55.

⁴⁵ *Id.* at 58.



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The record shows that COVFEFE and #COVFEFE have appeared on a very wide variety of goods other than clothing, including coffee mugs, personalized license

⁴⁶ August 11, 2017 Office Action at 59.

⁴⁷ September 11, 2017 Final Office Action at 47.

plates, coffee, ales, balloons, beach balls, treat boxes, dog T-shirts, a specialty cocktail, skirts and leggings, wall art, mobile phone cases, home decor items such as pillows and wall tapestries, wine, rugs, shower curtains, hats, keychains, necklaces, and cards, bath soaps, yard signs, a specialty sandwich, lunch bag backpacks, adult coloring books, doormats, golf balls, bumper stickers, and bracelets, as well as on signage for services, including a retail liquor store and several restaurants.⁴⁸ We reproduce below a small representative sample of these uses:



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⁴⁸ August 11, 2017 Office Action at 27, 51, 60-67, 68-70; September 11, 2017 Final Office Action at 27, 34-41, 42-43, 48, 56-58, 60-62, 68-69, 71-74, 77-79, 80-83, 86-87.

⁴⁹ August 11, 2017 Office Action at 60.

⁵⁰ *Id.* at 74.

⁵¹ September 11, 2017 Final Office Action at 36.



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3. The Nature of the Word COVFEFE as Understood by the Public

As discussed above, common laudatory phrases or statements that are ordinarily used in business or in a particular trade or industry, and slogans or other terms that are merely informational, are examples of claimed trademarks that may fail to

⁵² September 11, 2017 Final Office Action at 72.

⁵³ *Id.* at 86.

function as such due to their nature. *See Hulting*, 107 USPQ2d at 1177. The record shows that COVF EFE is a sui generis nonsense word that does not fit neatly into one of these categories of non-source identifying terms. The record also shows, however, that like more familiar expressions such as “No More RINOs!”, “I ♥ DC,” and “Drive Safely,” #COVF EFE does not function as a mark when applied to Applicant’s goods.

The Examining Attorney is correct that COVF EFE is “frequently and commonly used as a social, political, or similarly informational message in support or disapproval of President Trump.” 11 TTABVUE 7-8. Many of the uses of COVF EFE and #COVF EFE in the record are accompanied by visual and/or verbal references to the President and embody explicit or implicit political commentary, most of which is critical of the President,⁵⁴ but some of which is supportive.⁵⁵ At the same time, however, the record shows uses of COVF EFE and #COVF EFE for purposes other than political commentary, including the use of word in place of the word “coffee,”⁵⁶

⁵⁴ *See, e.g.*, August 11, 2017 Office Action at 10-11, 15, 26, 28, 43-44, 46, 48, 55, and 60; September 11, 2017 Final Office Action at 20-21, 34-35, 47-48, 60, 71, and 84. Applicant requests that “all negative covfefe references cited by examiner be struck” because in his view the cases cited by the Examining Attorney involve informational messages “that express positive support, affinity for, positive sentiment for, etc.,” and the Examining Attorney “is making the leap from supporting message to ANY message, this is not the intention of case law cited, in my opinion.” 12 TTABVUE 2. Applicant’s argument and request are not well-taken. A word or phrase need not express positive support of, or affinity for, someone or something to fail to function as a mark; it is enough if the word or phrase does not have source-identifying significance because of its nature, whether that is positive, negative, aspirational, or otherwise. Regardless of whether #COVF EFE conveys a positive or negative message about the President (or both or neither), it must identify Applicant as the sole source of the goods identified in the application to function as Applicant’s mark. The record shows that it does not do so, regardless of whatever meanings (if any) the purchasing public may ascribe to it.

⁵⁵ *See, e.g.*, August 11, 2017 Office Action at 25, 28, and 37; September 11, 2017 Final Office Action at 22-23, 38, 47, 58, 61, and 71.

⁵⁶ *See, e.g.*, August 11, 2017 Office Action at 16.

or in place of other words in familiar phrases (e.g., “Ask not what covfefe can do for you, but what you can do for #covfefe,” a take-off on a famous line in President Kennedy’s 1961 Inaugural Address),⁵⁷ in dialogue from television programs or movies (e.g., “Leave the gun, take the #covfefe,” a take-off on a signature line from THE GODFATHER),⁵⁸ in advertising (e.g., “The best part of waking up is #covfefe in your cup,” a take-off on a slogan for Folgers coffee),⁵⁹ and in self-styled parodies or other forms of humor. In other uses, particularly on merchandise, COVFEFE appears alone and has no discernable meaning beyond an allusion to the President’s tweet.

Applicant is thus correct that “[t]here is no true meaning of the word,” 12 TTABVue 2,⁶⁰ but it does not follow that #COVFEFE functions as his trademark. Although “covfefe” does not fall into the categories of “common laudatory phrases or statements that would ordinarily be used in business or in [a] particular trade or industry,” or “slogans or other terms that are considered to be merely informational in nature,” *Hulting*, 107 USPQ2d at 1177, the word is in the nature of a verbal Rorschach test, in which users and observers of the word can project onto it any meaning they wish, and, as a result, it has been used ubiquitously in the several non-trademark senses discussed above. “The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it

⁵⁷ August 11, 2017 Office Action at 12.

⁵⁸ September 11, 2017 Final Office Action at 7.

⁵⁹ *Id.* at 3, 10.

⁶⁰ The URBAN DICTIONARY “defines” the word as follows: “It literally means covfefe.” August 11, 2017 Office Action at 3.

will be recognized by purchasers as a trademark.” *Id.* (quoting *Eagle Crest*, 96 USPQ2d at 1229).

In that regard, the use of the hashtag #COVF EFE is particularly probative of the public’s understanding of the applied-for mark. A hashtag “is a form of metadata consisting of a word or phrase prefixed with the symbol ‘#’ . . .” that is “often used on social-networking sites to identify or facilitate a search for a keyword or topic of interest.” TMEP Section 1202.18. The fact that the applied-for mark is a hashtag does not preclude its registration, *see id.*; *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1632-33 (TTAB 2018),⁶¹ but because hashtags are commonly employed to facilitate categorization and searching of topics of public discussion, and the record makes it clear that #COVF EFE has served that purpose in promoting discussion of the mystery word in the President’s tweet, the public will not understand #COVF EFE to identify one, and only one, source of clothing, and to recognize Applicant as that source, when it appears on Applicant’s goods.

The record also shows that

the marketplace is awash in products that display the term [COVF EFE] as a prominent ornamental feature of such goods, in such a way that the display itself is an important component of the product and customers purchase the product precisely because it is ornamented with a display of the term in an informational manner, not associated with a particular source.

⁶¹ In *i.am.symbolic*, the Board noted that hashtags may also be used “to express personal feelings and emotions” and to emphasize “the sentiment conveyed by the term that follows the hash symbol, similar to the function of an exclamation point,” 127 USPQ2d at 1633 n.7 (internal quotation omitted), but found that the hash symbol in the mark #WILLPOWER for clothing did “not have source-identifying distinctiveness and at most simply appears as the social media tool to create a metadata tag”).

D.C. One Wholesaler, 120 USPQ2d at 1716. This “widespread ornamental use of [COVFefe] by third parties ‘is part of the environment in which [COVFefe] is perceived by the public and . . . may influence how [COVFefe] is perceived.’” *Id.* (quoting *Hulting*, 107 USPQ2d at 1178) (internal quotation omitted). The record shows that the public is accustomed to seeing COVFefe and #COVFefe displayed on a host of goods, including many items of clothing, from many different sources, and “[a]s a result, consumers will not perceive [#COVFefe] as applied to applicant’s goods as a source indicator pointing uniquely to applicant.” *Hulting*, 107 USPQ2d at 1179.

D. Applicant’s Specimens

Against the backdrop of the public’s use and understanding of the word “covfefe,” we turn to Applicant’s specimens of use. Applicant argues correctly that we must consider “the ‘size, location, and dominance of the wording as it is used in connection with the goods,’” 12 TTABVUE 2 (citing TMEP Section 1202.04), and he claims that his specimens are “evidence of NON ornamental use” that reflects “a source and brand of goods.” *Id.*

Applicant’s several specimens of use display the applied-for mark as follows:



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⁶² Applicant’s August 15, 2017 Amendment to Allege Use at 2.



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We agree with Applicant that his specimens use #COVFefe in ways befitting a trademark, but the fact that he has displayed #COVFefe “in a non-ornamental manner that is conventional for the display of [a trademark]” is not dispositive of the issue of whether it actually functions as a mark. *D.C. One Wholesaler*, 120 USPQ2d

⁶³ Applicant’s August 15, 2017 Amendment to Allege Use at 4, 7.

⁶⁴ *Id.* at 7-9.

at 1716. “In every case, the question is not whether the mark has been associated with the goods in a particular mode or manner, but whether the matter sought to be registered performs the function of a trademark by signifying to purchasers the source of the goods sold or offered for sale.” *Id.* (quoting *In re Paramount Pictures Corp.*, 213 USPQ 1111, 1115 (TTAB 1982)). As discussed and shown above, COVFefe and #COVFefe have appeared on numerous articles of clothing, and Applicant acknowledges the existence of “extensive 3rd party use of my mark in an ornamental manner” 12 TTABVUE 3. Given the non-source identifying nature of the word “covfefe,” and its admitted widespread ornamental use on merchandise, Applicant’s display of #COVFefe in the manner of a trademark is insufficient to make it one. *D.C. One Wholesaler*, 120 USPQ2d at 1716.

E. Conclusion

The record as a whole makes it clear that #COVFefe does not function as a trademark for Applicant’s identified goods because the word “covfefe” has been widely used by the public in dialogue and on merchandise in a non-source identifying manner, and it does not identify Applicant as the sole source of clothing identified by that term. Applicant’s proposed mark is thus ineligible for federal registration.

Decision: The refusal to register is affirmed.